No. 72-483

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Supreme Court of the United States

OCTOBER TERM, 1972

FRANCIS R. SALAZAR,
Petitioner

v.

UNITED STATES OF AMERICA

REPLY TO BRIEF FOR THE UNITED STATES IN OPPOSITION

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INDEX

	Page
REPLY TO STATEMENT	1
I.	1
II.	4
III.	4
REPLY ARGUMENT.	7
CONCLUSION	9

TABLE OF CASES

Page

United States vs. Britton,
107 U.S. 655, 27 L.Ed. 520,
2 S. Ct. 512 (1883) 8

United States vs. Britton,
108 U.S. 193, 27 L.Ed. 701,
2 S. Ct. 526 (1883) 8

United States vs. Northway,
120 U.S. 327, 332, 30 L.Ed. 664,
7 S. Ct. 580 (1887) 8

Rules of the Supreme Court of the United States:
Rule 24(4) 1

Statute:
18 U.S.C. §656 . . . . . 5, 7

18 U.S.C. §1006 5

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Pursuant to Rule 24(4) of the rules of the Court, Petitioner respectfully submits this Reply Brief.

REPLY TO STATEMENT

The Government's Brief In Opposition contains factually incorrect and misleading statements not supported by the Record below, to-wit:

I.

The Government states as to Petitioner and co-petitioners, Donald, Delmar and Paul Cooper, that:

> "They were found to have misapplied the monies of Rocky Mountain Bank by making or causing to be made loans for their benefit <u>through strawmen or through corporations which they owned or were in the process of acquiring</u>, without disclosing to the bank their interest in the loans. . ." (4; emphasis supplied)[1]

The characterization of certain loans, including the Cooper-Alpert (Alpert-Cooper) loan as being to "strawmen" is contrary to the Record. Not only did the Court of Appeals for the Tenth Circuit not characterize said loans as being to "strawmen", but the Trial Court was emphatic that there was no evidence of <u>any loans</u> that "Were without proper security" (XII Tr. 2382, lines 21-24); or any question "as to the adequacy of security" as to any loans (XIII Tr. 2382, line 25; and XIII Tr. 2383, line 2), and further, was emphatic that there was no evidence of the causing of a loan to be made to a "fictitious borrower" (XII Tr. 2383, lines 2-7).[2] As to the Cooper-Alpert loan, the Court repeatedly recognized that Alpert was "solvent"; that the Cooper-Alpert loan "was a good note financially", and that "Alpert's note was good".[3] Further, the Trial Court clearly stated ". . . all of the loans were reported, there is no question

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1/ Numbers within parentheses refer to pages in the Government's Brief In Opposition.

2/ See Petition for Certiorari (No. 72-483), page 21, and Supplement to Petition for Certiorari (No. 72-483, page 7).

3/ See Petition for Certiorari (No. 72-483), pages 20-21, for transcript references.

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about that" (IX Tr. 1538). Albeit, neither the Cooper-Alpert loan nor any other loan was to a "strawman".

The Government's quoted statement, supra, that some loans were ". . . through corporations which they owned or were in the process of acquiring. . ." has no application whatsoever to this Petitioner as the only substantive count on which he was convicted was the Cooper-Alpert loan transaction.

The Government's quoted statement, supra, that said loans were made ". . . without disclosing to the bank. . ." the alleged interest of the officers and directors in said loans, is refuted at footnote 3 of the Government's Brief In Opposition that ". . . petitioners dominated the Board of Directors of the bank. The bank's Loan and Discount Committee was throughout the pertinent period composed almost exclusively of bank director petitioners."[4] That there was an alleged failure to disclose the Cooper-Alpert loan transaction to the bank is

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4/ The Indictment never defined the term "bank" and the Government during trial and on appeal to the Tenth Circuit and now here, has consistently claimed the gist of the offense of "willful misapplication" in this case was a failure of the bank director petitioners to disclose their interest in certain loans to the "bank", consistently refusing to define "bank" and the Trial Court refused an instruction by this Petitioner defining the term "bank". See Petition for Certiorari (No. 72-483), pages 29-31, where this matter is discussed as a ground for a Writ of Certiorari.

also refuted by the Government's admission "The loan was approved by the Loan and Discount Committee" (4, n. 4).

II.

At pages 4-5 of the Brief In Opposition, it is stated as to the Cooper-Alpert loan, that:

> ". . . The loan papers indicated the money was for 'new business in the construction field.'. . ."

However, there was no evidence whatsoever as to who placed said notation on said loan papers. In its Answer Brief, page 6, the Government in the Tenth Circuit contended the loan papers were "drawn" to indicate the loan was for "new business in the construction field", but Harvey Alpert testified as to said loan papers (Exhibit 501) that said statement was not on the exhibit at the time he signed it (III Tr. 363-364, 370). No effort was made by the Government to attribute said statement to any of the defendants, despite the fact they had a handwriting expert available (Thomas S. Delaney) who actually testified as a handwriting expert to another matter (VIII Tr. 1338-1346).

III.

By placing considerable emphasis on the disposition of the proceeds of the Cooper-Alpert loan and sources of funds for repayment of same (Brief In Opposition, pages 4-5), the Government would cloud the true issues, i. e.

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whether a good financially sound loan to real and financially responsible individuals who readily acknowledged their liability for repayment of same constitutes a "willful misapplication" under 18 U.S.C. §656 by bank officers or directors who indirectly benefit therefrom.

Willful misapplication occurred, if at all, at the time the loan proceeds were paid to Cooper and Alpert. What they did with the proceeds is of no moment unless some law made it illegal for the bank director petitioners to share indirectly in said proceeds. However, no statute comparable to 18 U.S.C. §1006 makes it illegal or prohibits an officer or director of a state insured bank from participating or sharing in or receiving directly or indirectly any money. [5]

As to the sources of funds for repayment of the Cooper-Alpert loan, the acquisition of no portion of these funds was charged as a willful misapplication. The Government admits:

> ". . . The Alpert-Cooper loan was later repaid by a $5,000 Westland Industrial Bank bank money order drawn on the bank's account, a $5,000 renewal by Alpert and Michael Cooper, and a loan to Paul E. Cooper for the $55,000 balance plus accrued interest. The $5,000 renewal was eventually paid by petitioner Salazar. . ." (5, emphasis supplied).

5/ See Petition for Certiorari (No. 72-483), pages 22-23.

The Government's attempt to make the initial Cooper-Alpert loan a "willful misapplication" by virtue of the fact that repayment of same was made in part as to both the principal and interest in a total of $56,633 (See page A-6, Petition for Certiorari, No. 72-483) from proceeds of a loan to Paul E. Cooper, is wholly unjustified by the record. No willful misapplication was charged as to said loan to Paul E. Cooper and the Government's unfounded inference that some criminality attached to the making of said loan and the use of the proceeds in partial payment of the Cooper-Alpert loan, carries with it the conclusion that Petitioner was convicted as to the Cooper-Alpert loan transaction which took place in February, 1966, on the basis of the Paul E. Cooper loan transaction which took place in March of 1967, contrary to the concept that an individual may not be charged with one criminal offense and convicted on the purported proof of another uncharged crime.

Further, the Record will not sustain the Government's contention that the Denver Revival Tabernacle was transferred to The Rocky Mountain Bank ". . .at a highly inflated price" (5, n. 7). The transfer of the Denver Revival Tabernacle real property to the bank did not take place until December 23, 1968 (Exhibits 101-114), approximately 21 months after the loan to Paul E. Cooper on March 3, 1967 and approximately 32 months after the Cooper-Alpert loan in February, 1966. Further, transfer of said tabernacle property was at an appraised value of $275,000 as of December 10, 1968 (III Tr. 521, 523, Exhibit 116). The Government's Exhibit 121, made on May 15, 1969, attempting to show a lesser appraised

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value was excluded from evidence by the Court (VI Tr. 1001). Further, the transfer of said tabernacle property fully complied with C.R.S. 1963, 14-7-1, which provides, in part, that:

> "(1) A state bank may take property of any kind to satisfy, in whole or in part, or to protect an indebtedness previously created in good faith by it. . ."

whereas the Government now infers to the contrary, no evidence was adduced whatsoever at trial disclosing any illegality whatsoever in the transfer of the tabernacle property to the bank.

REPLY TO ARGUMENT

As to Cooper-Alpert, the Government contends they ". . . were bona fide only in the sense that they were real persons. . ." (9). However, they were "bona fide" not simply because they were "real persons", but also because they were "solvent"; the Cooper-Alpert loan ". . . was a good note financially"; and Harvey Alpert at trial repeatedly acknowledged that he was liable for the payment of same. (III Tr. 379, 389-391, 395-396).

The Government claims that the aim of U.S.C. §656 is:

> "To prevent abuse of the authority enjoyed by bank directors regarding the use and disbursement of bank funds. . ." (10).

This goes far beyond United States vs. Britton, 108 U.S. 193, 27 L.Ed. 701, 2 S.Ct. 526 (1883), where the court held there was no willful misapplication and not even necessarily a fraud on the banking association where the gravamen of the charge was that the defendant president and bank director ". . . being insolvent, procured to be discounted his own note, the same not being well secured, the payee and indorser thereof being also insolvent, which he, the defendant well knew. . ." Further, said contention goes far beyond the holding in United States vs. Northway, 120 U.S. 327, 332, 30 L.Ed. 664, 7 S.Ct. 580 (1887), where, in discussing United States vs. Britton, 107 U.S. 655, 27 L.Ed. 520, 2 S.Ct. 512 (1882), the court stated:

> ". . . It was held to be of the essence of the criminality of the misapplication that there should be a conversion of the funds. . ." (Emphasis supplied).

The Government's contention that the aim of the statute is ". . . to prevent abuse of the authority enjoyed by bank directors regarding the use and disbursement of bank funds. . .", is a clear indication of an attempt to extend the scope of said statute far beyond what ever possibly could have been contemplated. It is further evidenced by the Government's statement:

> ". . .[T]he court properly instructed the jury that a willful misapplication under Section 656 occurs when a bank officer causes a loan to be made for his own

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benefit and conceals his interest in the loan from the bank. . . ." (Emphasis supplied).[6]

Other arguments in the Brief In Opposition are fully covered in the Petition for a Writ of Certiorari and Supplement thereto.

CONCLUSION

Petitioner renews the prayer of his Petition and Supplement thereto that a Writ of Certiorari be issued to the United States Court of Appeals for the Tenth Circuit.

Respectfully submitted,

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6/ Which instruction, without a further instruction as to the definition of the term "bank" told the jury nothing. Parenthetically, at point 4, page 16, note 23 of the Brief In Opposition, it is claimed that Petitioners' proffered Instruction No. 19 did not contain language that the alleged concealment must have been "from a majority of the Board of Directors of the Rocky Mountain Bank". Said Instruction No. 19 is fully set forth at Volume II of the Appendix, pg. 161, and clearly contains said language.